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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1938.

No. 391

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

ELIZABETH C. JACOBS, EXECUTRIX OF THE LAST WILL AND TESTAMENT OF W. FRANCIS JACOBS, DECEASED,
Respondent.

MOTION.

HUGH W. McCULLOCH,
Counsel for Respondent.

NED P. VEATCH,
Of Counsel.

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MOTION.

Now comes Elizabeth C. Jacobs, the Executrix of the Last Will and Testament of W. Francis Jacobs, deceased, the Respondent in the above entitled cause, by Hugh W. McCulloch, her counsel, and moves this Honorable Court to set aside the judgment entered herein on February 27, 1939, and to enter judgment herein affirming the judgment of the Circuit Court of Appeals for the Seventh Circuit.

In support of said motion, the Respondent respectfully shows the following:

1. That on March 1, 1937, during the First Session of the 75th Congress, there was enacted what now appears as Section 375a of Title 28 of the United States Code. Said Section 375a was an addition to said Title 28 not theretofore appearing therein and provided as follows:

"An Act to provide for retirement of Justices of the Supreme Court.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Justices of the Supreme Court are hereby granted the same rights and privileges with regard to retiring, instead of resigning, granted to judges other than Justices of the Supreme Court by section 260 of the Judicial Code (U. S. C., title 28, sec. 375) and the President shall be authorized to appoint a successor to any such Justice of the Supreme Court so retiring from regular active service on the bench, but such Justice of the Supreme Court so retired may nevertheless be called upon by the Chief Justice and be by him authorized to perform such judicial duties, in any judicial circuit, including those of a circuit justice in such circuit, as such retired justice may be willing to undertake."

(Act of March 1, 1937, c. 21, Secs. 1, 2; 50 Stat. 24; 28 U. S. C., Supp. IV, 1934 ed. Sec. 375a.)

That Section 260 of the Judicial Code (U. S. C., title 28, Sec. 375) which was referred to in said Section 375a provided in part as follows:

"When any judge of any court of the United States, appointed to hold his office during good behavior, resigns his office after having held a commission or commissions as judge of any such court or courts at least ten years, continuously or otherwise, and having attained the age of seventy years, he shall, during the residue of his natural life, receive the salary which is payable at the time of his resignation for the office that he held at the time of his resignation. But, instead of resigning, any judge other than a justice of the Supreme Court, who is qualified to resign under the foregoing provisions, may retire, upon the salary of which he is then in receipt, from regular active service on the bench, and the President shall thereupon be authorized to appoint a successor; but a judge so retiring may nevertheless be called upon by the senior circuit judge of that circuit and be by him authorized to perform such judicial duties in such circuit as such retired judge may be willing to undertake, or he may be called upon by the Chief Justice and be by him authorized to perform such judicial duties in any other circuit as such retired judge may be willing to under-

take or he may be called upon either by the presiding judge or senior judge of any other such court and be by him authorized to perform such judicial duties in such court as such retired judge may be willing to undertake."

Act of March 1, 1929, c. 419; 45 Stat. 1422; 28 U. S. C., 934 ed., Sec. 375.)

2. That prior to March 1, 1937, Justices of the Supreme Court who did not desire to continue in regular active service on the bench could not retire but could only resign from that office and any such Justice, having so resigned, no longer held a commission as a judge of any court created under the provisions of Section 1 of Article III of the Constitution of the United States, and the amount of the compensation that such individual was entitled to receive as a former Justice of the Supreme Court but now resigned, was not subject to the provisions of said Section 1 of Article III of the Constitution and the amount of such compensation could be reduced by Congressional action, and in the case of Mr. Justice Holmes, who resigned on January 2, 1932, his compensation was reduced from $20,000 per year to $10,000 per year by Section 107 (a) (5) of the "Economy Act" enacted June 30, 1932. (47 Stat. 402; 5 U. S. C., Supp. VI, p. 37.)

3. That under the provisions of said Sections 375 and 375a of Title 28 of the United States Code, on and after March 1, 1937 the emoluments of the office of Justice of the Supreme Court were increased, in that Justices, who had attained or should attain the age of seventy years and who had held a commission as Justice of the Supreme Court for at least ten years prior thereto, were authorized to retire from regular active service on the bench, upon the salary of $20,000 per year, but after so retiring, their status continued to be that of judge as defined by Section 1 of Article III of the Constitution and the amount of compensation receivable by them could not, under the provisions

of Section 1 of Article III of the Constitution, be decreased by any action of Congress and said compensation was receivable by them without any obligation to perform any further service therefor, all of which were rights, privileges and emoluments which had not theretofore been granted to Justices of the Supreme Court.

Evans v. *Gore*, 253 U. S. 245.
Booth v. *United States*, 291 U. S. 339.

4. That under the provisions of Section 375a of Title 28 quoted above, there was created the office of Justice to succeed a Justice of the Supreme Court retiring from regular active service on the bench, an office which had not theretofore existed.

5. That the second paragraph of Section 6 of Article I of the Constitution provides in part as follows:

> "No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; * * *".

The occasion for the inclusion of this provision in the Constitution is indicated in the debate in the Constitutional Convention with reference to this provision.

The following appears in Mr. Madison's notes of the session of the Convention held on September 3, 1787:

> "Mr. Sherman was for entirely incapacitating members of the Legislature. He thought their eligibility to offices would give too much influence to the Executive. He said the incapacity ought at least to be extended to cases where salaries should be *increased*, as well as *created*, during the term of the member. He mentioned also the expedient by which the restriction could be evaded to wit: an existing officer might be translated to an office created, and a member of the Legislature be then put into the office vacated."

(The Records of the Federal Convention, Farrand, 1911 Edition, Volume 2, page 490.)

The purposes of this provision of the Constitution were further indicated by Luther Martin, one of the delegates to the Constitutional Convention, in his address to the Legislature of the State of Maryland on November 29, 1787. In that address he stated:

> "In the *sixth* section of the *first* article, it is provided, that senators and representatives may be appointed to any civil office under the authority of the United States, except such as shall have been created, or the emoluments of which have been increased, during the time for which they were elected. * * * But, Sir, we sacredly endeavoured to preserve all that part of the resolution which prevented them from being *eligible* to *offices* under the *United States;* as we considered it *essentially necessary* to preserve the *integrity, independence,* and *dignity* of the legislature and to secure its members from *corruption.*"

(The Records of the Federal Convention, Farrand, 1911 Edition, Volume III, page 200f.)

6. That on May 18, 1937 Mr. Justice Van Devanter forwarded to President Franklin D. Roosevelt the following letter:

> "*My dear Mr. President:*
>
> Having held my commission as an Associate Justice of the Supreme Court of the United States and served in that Court for 26 years, and having come to be 78 years of age, I desire to avail myself of the rights, privileges, and judicial service specified in the act of March 1, 1937, entitled 'An act to provide for retirement of Justices of the Supreme Court', and to that end I hereby retire from regular active service on the bench—this retirement to be effective on and after the 2d day of June 1937, that being the day next following the adjournment of the present term of the Court.
>
> I have the honor to remain,
>
> Very respectfully yours,
>
> WILLIS VAN DEVANTER."

(Congressional Record, Volume 81, Part 7, page 8074.)

and thereafter on or about June 2, 1937, Mr. Justice Van Devanter retired from regular active service on the bench under the provisions of said Section 375a.

7. That on August 12, 1937, the President of the United States sent the following message to the Senate of the United States:

"The White House, *August 12, 1937.*

To the Senate of the United States:

I nominate Hugo L. Black, of Alabama, to be an Associate Justice of the Supreme Court of the United States.

Franklin D. Roosevelt."

(Congressional Record, Volume 81, Part 8, Page 8769), and on August 17, 1937 the Senate confirmed the nomination of the Honorable Hugo L. Black to be an Associate Justice of the Supreme Court of the United States (Congressional Record, Volume 81, Part 8, Page 9103), and since October 4, 1937, the Honorable Hugo L. Black has sat as an Associate Justice of the Supreme Court of the United States.

8. That the Honorable Hugo L. Black was duly elected United States Senator from Alabama for a six year term ending January 3, 1939 and at the time of the adoption by the Senate of said Section 375a of Title 28 he was serving as such Senator and voted in favor of the adoption of said Section 375a of Title 28 (Congressional Record, Volume 81, No. 40, Page 2055).

9. That in the above entitled case the Honorable Hugo L. Black sat as an Associate Justice of the Supreme Court in the consideration and decision thereof and rendered an opinion which was concurred in by Chief Justice Hughes, Mr. Justice Reed and Mr. Justice Frankfurter, a majority of the Court. A dissenting opinion was also rendered which was concurred in by Mr. Justice McReynolds, Mr. Justice Butler and Mr. Justice Roberts. Mr. Justice Stone took no part in the consideration or decision of this case.

10. That under the provisions of Section 6 of Article I of the Constitution of the United States, the Honorable Hugo L. Black was not qualified to sit on the Supreme Court of the United States in the consideration and decision of this case, and the Respondent has sustained or is immediately in danger of sustaining direct and material injury by reason thereof, in that under the provisions of the judgment of this Court entered on February 27, 1939, she will not be entitled to recover the moneys in question in said case and will be obligated to pay the costs chargeable against the losing party in said case, and that had the Honorable Hugo L. Black not been sitting in the consideration and decision of this case, this Court would have been evenly divided as to the determination of the issues in this case, in which event the judgment of this Court would have been to sustain the judgment of the Circuit Court of Appeals for the Seventh Circuit which was in favor of the Respondent and that unless this motion be granted she will be deprived of property without due process of law in violation of the Fifth Amendment to the Constitution.

11. That on February 27, 1939, for the first time, the matters and things set forth above in support of this motion became material for a determination of the issues of this case.

WHEREFORE, the Respondent respectfully prays that it be determined by this Court (1) that the Honorable Hugo L. Black served as an Associate Justice of the Supreme Court in the consideration and decision of this cause in violation of Section 6 of Article I of the Constitution of the United States, (2) that the judgment of this Court entered in this cause on February 27, 1939 was therefore in violation of the Fifth Amendment of the Constitution of the United States, (3) that the judgment entered herein on February

27, 1939 should be set aside and that judgment should be entered herein confirming the judgment of the Circuit Court of Appeals of the Seventh Circuit, and (4) that no mandate issue in this cause until this motion is disposed of.

Respectfully submitted:

HUGH W. MCCULLOCH,
Counsel for Respondent

NED P. VEATCH,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

Nos. 391 and 482.—October Term, 1938.

The United States of America, Petitioner, vs. Elizabeth C. Jacobs, Executrix of the Last Will and Testament of W. Francis Jacobs, Deceased.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.
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Edward Jordan Dimock, as Substituted Executor of the Last Will and Testament of Henry C. Folger, Deceased, etc., Petitioner, vs. Walter C. Corwin, Late Collector of Internal Revenue, First District of New York.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
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[February 27, 1939.]

Mr. Justice Black delivered the opinion of the Court.

No. 391.

The question is whether the entire value or only one-half the value of real property—purchased by a decedent with his own funds and held at his death by his wife and himself under a joint tenancy set up prior to 1916—may be included in the decedent's gross estate under the 1924 Revenue Act.

In 1909, real estate in Illinois was conveyed to W. Francis Jacobs, the decedent, and Elizabeth C. Jacobs, his wife, "as joint tenants" and this joint tenancy continued until decedent's death; the wife never contributed any part of, or consideration for, the joint property; decedent died June 17, 1924 (after the effective date of the 1924 Revenue Act), and as survivor the wife became sole owner in fee of the whole of the joint property.

The Commissioner included the full value of the property in decedent's gross estate for taxation under the 1924 Act. As executrix,

respondent paid the tax, and sought recovery in the District Court which held that the estate tax could be imposed only upon one-half of the joint property's total value. The Circuit Court of Appeals affirmed.[1]

Respondent construes the 1924 Revenue Act as taxing—by its terms—only one-half the value of the joint property, and contends that inclusion of the property's entire value for estate tax purposes would as retroactive taxation violate the Due Process Clause of the Fifth Amendment.

First. It is clear that Congress intended, by Section 302 of the 1924 Act,[2] to include in the gross estate of a decedent the full value at death of all property owned by him and any other in joint tenancy or by the entirety—irrespective of the date of the tenancy's creation—insofar as the property or consideration therefor is traceable to the decedent. Subdivision (h) of Section 302 specifically provided that the provisions of 302 relating to joint tenancies should "apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as . . . described therein, whether made, created, arising, existing, exercised, or relinquished *before or after the enactment of this Act.*" (Italics supplied.) Section 302(h) was enacted in the 1924 Act after this Court, on May 1, 1922, had decided that the 1916 Act did not purport to impose an estate tax measured by the value of property held in joint tenancies created prior to the 1916 Act.[3] "The clear language of the 1924 stat-

[1] 97 F. (2d) 784.

[2] The 1924 Act imposed a tax (Sec. 301, Act of 1924, 43 Stat. 253, 303) "upon the transfer of the net estate of every decedent dying after" the Act's enactment, and included (Sec. 302) in each gross estate the value of "the interest . . . [in property] held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, . . . except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided*, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person . . . ."

[3] Schwab v. Doyle, 258 U. S. 529, 535; Knox v. McElligott, 258 U. S. 546, 549. Respondent relies upon language of the Knox case to support the contention that Sec. 302 of the 1924 Act is retroactive in its effect on joint tenancies such as the one here. However, the actual judgment of the Court in that case went no further than to hold that the terms of the 1916 Act there considered did not require the inclusion—in gross estates—of the value of property held in joint tenancies created prior to the enactment of that particular law.

ute repels the notion that it has no application to joint tenancies created prior to September 8, 1916."[4]

Second. Here, decedent paid the entire purchase price of the joint property with his own individual funds and, therefore, the 1924 statute required the inclusion of the full value of the joint property in his gross estate. Contending that the tax as so applied is retroactive, respondent insists that the Due Process Clause of the Fifth Amendment forbids such taxation. The reasoning is that a one-half interest in the joint property was transferred to, and vested in the wife in 1909; that the tax in question only applies to transfers; and that the one-half interest transferred to the wife in 1909 could not thereafter (1924) be taxed as a part of decedent's gross estate without retroactively applying the tax to the 1909 transfer.

But the tax was not levied on the 1909 transfer and was not retroactive. At decedent's death in 1924, ownership and beneficial rights in the property which had existed in both tenants jointly changed into the single ownership of the survivor. This change in ownership, attributable to the special character of joint tenancies, was made the occasion for an excise, to be measured by the value of the property in which the change of ownership occurred. Had the tenancy not been created, this survivorship and change of ownership would not have taken place, but the tax does not operate retroactively merely because some of the facts or conditions upon which its application depends came into being prior to the enactment of the tax.[5]

Death duties or excises imposed upon the occasion of change in legal relationships to property brought about by death are ancient in origin.[6] Congress has the power to levy a tax upon the occasion of a joint tenant's acquiring the status of survivor at the death of a co-tenant. In holding that the full value of an estate by the entirety may constitutionally be included in a decedent's gross estate for estate tax purposes, this Court said: "The question . . . is, not whether there has been, in the strict sense of that word, a 'transfer' of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into

[4] Gwinn v. Commissioner, 287 U. S. 224, 226; cf., Phillips v. Dime Trust & S. D. Co., 284 U. S. 160, 166.

[5] Cf., Reynolds v. United States, 292 U. S. 443, 449; Cox v. Hart, 260 U. S. 427, 435.

[6] See, Knowlton v. Moore, 178 U. S. 41, 47, 1 Cooley, "Taxation", § 48, (4th ed.), Seligman, "Essays in Taxation", Ch. V, (9th ed., 1921).

being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights . . . .

"At . . . [the co-tenant's] death, however, and because of it, . . . [the survivor] for the first time, became entitled to exclusive possession, use and enjoyment; she ceased to hold the property subject to qualifications imposed by the law relating to tenancy by the entirety, and became entitled to hold and enjoy it absolutely as her own; and then, and then only, she acquired the power, not theretofore possessed, of disposing of the property by an exercise of her sole will. Thus the death of one of the parties to the tenancy became the 'generating source' of important and definite accessions to the property rights of the other. These circumstances, together with the fact, the existence of which the statute requires, that no part of the property originally had belonged to the wife, are sufficient, in our opinion, to make valid the inclusion of the property in the gross estate which forms the primary base for the measurement of the tax."[7]

Thereafter, it was further decided that the full value of the property passing to a survivor under a tenancy by the entirety created prior to the estate tax of 1916 could be included in the gross estate.[8] Congress—it has been held—may also constitutionally apply an estate tax to the whole of a joint tenancy created after the 1916 Act,[9] and to half of a joint tenancy created prior to the 1916 Act, where the decedent alone had furnished consideration for the joint property.[10]

It is urged that these decisions do not support the tax here upon the full value of the joint property, because this tenancy was created prior to the estate tax law of 1916. Respondent relies upon differences in the nature of tenancies by the entirety and joint

[7] Tyler *v.* United States, 281 U. S. 497, 503, 504.

[8] Third National Bank & Trust Co. *v.* White, 45 F. (2d) 911, affirmed 287 U. S. 577; Helvering, Commissioner *v.* Bowers, 303 U. S. 618.

[9] Foster *v.* Commissioner, 303 U. S. 618.

[10] Gwinn *v.* Commissioner, *supra;* Griswold *v.* Helvering, 290 U. S. 56, 61. In the Griswold case this Court said: "Whether this application of the statute gives it a retroactive effect is the sole question here involved; and with that we find no difficulty. Under the statute the death of decedent is the event in respect of which the tax is laid. It is the existence of the joint tenancy at that time, and not its creation at an earlier date, which furnishes the basis for the tax."

tenancies in order to remove the present case from the application of these prior adjudications. Since a joint tenant's interest in realty is severable and subject to sale, the argument is that upon the death of a co-tenant the survivor actually receives nothing more than the decedent's one-half interest and therefore no more can be subjected to a death duty. On the other hand, respondent explains the permissible taxation of the whole of a tenancy by the entirety by reference to the "amiable fiction"[11] of the common law, under which ownership of a husband and wife in tenancy by the entirety is deemed a single individual unity and each owns all and every part of the property so held. By virtue of this feudal fiction of complete ownership in each of two persons, the surviving tenant by the entirety is conceived to be the recipient of all the property upon the death of the co-tenant, and therefore—it is said—all the property can be taxed.

The constitutionality of an exercise of the taxing power of Congress is not to be determined by such shadowy and intricate distinctions of common law property concepts and ancient fictions.[12] The Constitution grants Congress the "Power to lay and collect Taxes, Duties, Imports, and Excises, to pay the Debts and provide for the common Defense and general Welfare." No more essential or important power has been conferred upon the Congress and the presumption that an Act of Congress is valid applies with added force and weight to a levy of public revenue.[13]

In addition, there is sufficient substantial similarity between joint tenancies and tenancies by the entirety to have moved Congress to treat them alike for purposes of taxation. Practical necessities—and taxation is "eminently practical"[14]—may well have led Congress to group different types of joint ownership together for taxa-

[11] Cf., Tyler *v.* United States, *supra*, at 503.

[12] A joint tenancy in Illinois—where the property involved here is located—is described by that State's highest Court (as in the common law) as follows: "The properties of a joint estate are derived from its unity, which is fourfold: the unity of interest, the unity of title, the unity of time and the unity of possession; or, in other words, joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time and held by one and the same undivided possession." Deslauriers *v.* Senesac, 331 Ill. 437, 440. The "learning in the books merely shows that in case of a conveyance to husband and wife, there is a *fifth unity*, to wit: that of person . . . ." Topping *v.* Sadler, V Jones (No. Car.) 357, 360. See note, 30 L. R. A. 305.

[13] Nicol *v.* Ames, 173 U. S. 509, 515.

[14] *Id.*, 516.

tion rather than to afford different treatment to each varying shade of such ownership. A tenancy by the entirety "is essentially a joint tenancy, modified by the common law theory that husband and wife are one person."[15] Only a fiction stands between the two. Survivorship is the predominant and distinguishing feature of each. The "grand incident of joint estate is the doctrine of *survivorship*, 'by which, when two or more persons are seized of a joint estate. . . . the entire tenancy upon the decease of any of them remains to the survivors, and at length to the last survivor; and he shall be entitled to the whole estate, whatever it may be.'"[16]

While it is true that until the death of decedent here each joint tenant possessed the right to sever the joint tenancy, each was nevertheless subjected to the hazard of losing the complete estate to the other as survivor. Prior to decedent's death, his wife had no right to dispose of her interest by will, nor could it pass to her legal heirs. She might survive and thereby obtain a complete fee to the property with attendant rights of possession and disposition by will or otherwise. Until the death of her co-tenant, the wife could have severed the joint tenancy and thus have escaped the application of the estate tax of which she complains. Upon the death of her co-tenant she for the first time became possessed of the sole right to sell the entire property without risk of loss which might have resulted from partition or separate sale of her interest while decedent lived. There was—at his death—a distinct shifting of economic interest,[17] a decided change for the survivor's benefit. This termination of a joint tenancy marked by a change in the nature of ownership of property was designated by Congress as an appropriate occasion for the imposition of a tax. Neither the amount of the tax nor its application to the survivor's change of status and ownership, was in any manner dependent upon the date of the joint tenancy's creation, whether before, or after, 1916. It is immaterial that Congress chose to measure the amount of the tax by a percentage of the total value of the property, rather than by a part, or by a set sum for each such change. The wisdom both of the tax and of its measurement was for Congress to determine.

[15] 1 Tiffany, "Real Property" (1920), § 194; see, Littleton's "Tenures," § 291 (Wambaugh, ed., 1903).

[16] Freeman, "Cotenancy and Partition," 2nd ed., § 12.

[17] Cf., Chase Nat. Bank v. United States, 278 U. S. 327, 338; Saltonstall v. Saltonstall, 276 U. S. 260, 271.

No. 482.

No. 482 involves provisions of the 1926 Revenue Act (44 Stat. 9) substantially identical to those of the 1924 Act considered above. Here, also, a joint tenancy (in personal property) was created by man and wife prior to 1916. However, not all of the joint property was contributed by the decedent, but a portion was contributed to the tenancy by the wife who survived. This property which she transferred to the tenancy had in turn been previously given to her—without consideration—by decedent before the creation of the joint tenancy. At decedent's death in 1930, an estate tax was assessed and paid upon the full value of the joint property, including that part contributed by the survivor but ultimately traceable to the decedent.

The District Court held that the full value of the joint property was taxable,[18] and the Circuit Court of Appeals affirmed.[19]

The contention that the 1926 tax is unconstitutional under the Fifth Amendment because imposed upon the total value of the joint tenancy at decedent's death is without merit, for reasons stated in No. 391.

However, there is here the further argument that the courts below erred in construing the 1926 Act to require the inclusion in the gross estate of that part of the joint property (shares of stock) contributed to the joint tenancy by the survivor, but which had been paid for and given to her by decedent prior to the creation of the tenancy.

Although subdivision (h) of Section 302 of the 1926 Act specifically required inclusion in the gross estate of the full value of the joint property at death in proportion to the decedent's contribution to the purchase price, petitioner relies upon that part of subdivision (e) which excepts "such part [of the joint property] . . . as may be shown to have originally belonged to . . . [the survivor] and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth." Petitioner insists that this exception should be read "except such parts thereof as may be shown to have originally belonged to [the survivor] and never *after the passage of this Act* to have been received or acquired by the latter

[18] 19 F. Supp. 56.
[19] 99 F. (2d) 799.

from the decedent for less than an adequate and full consideration in money or money's worth."

The surviving joint tenant in this case comes squarely within the governing statutory provision because she "received" and "acquired" all of the property contributed by her to the joint tenancy "from the decedent for less than an adequate and full consideration in money or money's worth." This language adopted by Congress clearly and unambiguously indicates the purpose to tax the entire value of a joint tenancy under circumstances shown by this record. We are without authority to add language to the statute directly contrary to such a clearly expressed purpose.

The judgment in No. 391 is reversed and that in No. 482 is affirmed.

Mr. Justice STONE took no part in the consideration or decision of these cases.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

Nos. 391 and 482.—October Term, 1938.

The United States of America, Petitioner, 391 *vs.* Elizabeth C. Jacobs, Executrix of the Last Will and Testament of W. Francis Jacobs, Deceased, Respondent.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.
Edward Jordan Dimock, as Substituted Executor of the Last Will and Testament of Henry C. Folger, Deceased, etc., Petitioner, 482 *vs.* Walter C. Corwin, Late Collector of Internal Revenue, First District of New York.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 27, 1939.]

Mr. Justice McReynolds, Mr. Justice Butler, and Mr. Justice Roberts think that the judgment in No. 391 should be affirmed and that in No. 482 should be reversed.

It has long been the settled doctrine of this court that Congress cannot retroactively tax, as testamentary, a transfer consummated in accordance with existing law before the adoption of a system of estate taxation, and where the parties, at the time of the transaction, had no notice of intent to tax it as a transfer in contemplation of death or to take effect in possession or enjoyment at or after death.[1] In order to avoid holding taxing acts unconstitutional on this ground, the court has often construed them as applying prospectively only.[2] Reliance is placed by the government on decisions

[1] Nichols v. Coolidge, 274 U. S. 531; Helvering v. Helmholtz, 296 U. S. 93, 97; White v. Poor, 296 U. S. 98, 102.

[2] Shwab v. Doyle, 258 U. S. 529; Knox v. McElligott, 258 U. S. 5 ion Trust Co. v. Wardell, 258 U. S. 537; Levy v. Wardell, 258 U. S. 542; n v. Frick, 268 U. S. 238.

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sustaining inclusion in the estate of one spouse of the entire value of an estate by the entireties. In the earlier cases wherein the exaction was upheld the act operated prospectively and affected only such an estate arising after passage of the statute,[3] or the estate came into being after the adoption of a system of taxation which might well include such a transfer within its scope.[4] Subsequently the inclusion of the entire value in the taxable estate of one spouse was sustained where the tenancy by the entireties antedated the passage of the estate tax acts.[5] The decision was based upon the peculiar nature of a tenancy by the entireties as expounded in *Tyler* v. *United States*. A transfer tax measured by one-half the value of an estate in joint tenancy has been approved although the estate was created prior to the adoption of the system of estate taxes;[6] but the court has never passed upon the validity of such a tax measured by the value of the entire joint estate. There are marked differences between a tenancy by the entireties and a joint tenancy in respect of the power of one tenant to destroy the joint estate, to transfer or encumber his interest and otherwise obtain the fruits of it. In order to prevent evasion Congress may include the value of the entire estate in the gross estate as a measure of the tax where the estate originates after adoption of the law.[7] But it may not retroactively apply such measure to an estate created at a time when its creators had no reason to expect that such a tax would be laid in view of the settled rules of property.

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[3] Tyler v. United States, 281 U. S. 497.

[4] Phillips v. Dime Trust & Safe Deposit Co., 284 U. S. 160.

[5] Third National Bank & Trust Co. v. White, 287 U. S. 577; Helvering v. Bowers, 303 U. S. 618.

[6] Knox v. McElligott, *supra;* Gwinn v. Commissioner, 287 U. S. 224; Cahn v. United States, 297 U. S. 691.

[7] See Nichols v. Coolidge, *supra*, p. 542; Tyler v. United States, *supra*, p. 505; Helvering v. City Bank Co., 296 U. S. 85, 90.